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Supreme Court, U.S.
FILED
NOV 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Case No. _____

NOVEMBER TERM

MARGARET WATTAWA

Petitioner

vs.

WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES - PROBATION

Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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55pp

QUESTION PRESENTED FOR REVIEW

Was Defendant's Constitutional right to a fair trial violated by a Wisconsin Statute and attendant Instruction which permitted her to be tried as a party-to-a-crime wherein she was the sole defendant?

TABLE OF AUTHORITIES

	Page
Statutes Cited:	
939.05 Wisconsin Statutes	22
Constitution:	
Article 5 and 7 Wisconsin Constitution.	25
Article VI and XIV United States Constitution.	25
Cases Cited:	
In Re Winship 397 U.S. 358, 90 S. ct 1968, 25 LED. 368, (1970)	26
United States vs. Gibson 553 F 2d 453 (5th Circuit 1977).	27
Holland vs. State, 91 Wis 2d 134 280 N.W. 288 (1979).	30
Constitutional Law-Criminal Proceed URE-Jury Instructions and the Unanimous Jury Verdict 1978 Wis Law Review 339.	32
Wisconsin Jury Instructions 400.	22

TABLE OF CONTENTS

	Page
Jurisdictional Statement.....	5
Question Presented	2
Opinion Below	6
Table of Authorities	3
Statement of Case	8-21
Reasons for Granting This Writ	22-38
Appendix	101-117

JURISDICTIONAL STATEMENT

The judgement of the Court of Appeals for the Seventh Circuit was made and entered on August 6, 1987 and a copy thereof is appended to this petition in the Appendix. The jurisdiction of this court is invoked under 28 U.S.C. S. Para. 1254 (1).

OPINION BELOW

The Judgement Order of the United States Court of Appeals for the Seventh Circuit was entered August 6, 1987, and is a decision without a published opinion and is reproduced in the Appendix to this brief at page 101 thereof.

The order of the United States District Court for the Eastern District of Wisconsin was entered December 1, 1986, and together with the Magistrate's recommendation on which it was based, dated June 4, 1986, are reproduced in the Appendix at pages 101-107.

STATUTE INVOLVED

Wisconsin Statute:

939.05 Parties to crime. (1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although he did not directly committ it and although the person who directly committed it has not been convicted or had been convicted of some other degree of the crime or of some other crime based on the same act.

(2) A person is concerned in the commission of the crime if he:

(a) Directly commits the crime; or

(b) Intentionally aids and abets the commission of it; or

(c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also considered in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his mind and no longer desires that the crime be committed and notifies the other parties concerned of his withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

STATEMENT OF CASE

This case involves a claim that the sole defendant, Margaret Wattawa, a trusted employee and friend of one Jacob Di Beneditto stole $40,000.00 from a safe belonging to Mr. Di Beneditto located in the latter's home.

Complainant, Jacob Di Beneditto, in late February and early March, 1983, lived in his home at 3300 West Parnell Avenue, City and County of Milwaukee, State of Wisconsin. Between February 28, 1983 and March 2, 1983, he was physically out of the home because he was at the hospital. Di Beneditto stated that the only persons who had the keys to his home and burglar alarm during the period of time that he was away during which the house was locked and the burglar alarm on, are himself, his son Claude Di Beneditto who lived with him and was confined to a wheel chair, and his non-resident housekeeper,

the petitioner, Margaret Wattawa. Jacob Di Beneditto stated that during the period of time that he was in the hospital he had two safes, one of which was hidden in the basement, and in one of the locked drawers of the hidden safe he kept $40,000.00 and he kept additional sums in excess of $250.00 in the non-hidden safe. Shortly after returning from the hospital, he discovered the money missing from both safes (Rec. 1, p.1)

The house was equipped with a burglar alarm system (Rec. 18, p. 18) and had a chair lift system in the basement stairwell so his son could go up and down stairs (Rec. 18, p. 20) to use his ham radio equipment and work on model airplanes (Rec. 18, p. 23)

The Complainant had constructed an area for a large safe. It was hidden behind a plywood panel which could be removed and the panel is concealed by

a metal cabinet. He also covered the safe with a cabinet. This panel and cabinet are in an area off of the downstairs shower (Rec. 18, p. 26-30). The only access to the safe is through the plywood panel (Rec. 18, p. 31-32).

The safe had a combination lock on the outside and inside the safe each drawer could also be secured with a key lock (Rec. 18, p. 32).

There was another safe, a small one, kept next to a desk in the basement work area (Rec. 18, p. 33). He kept the keys for the large safe's drawers in this safe.

The combination for the large safe was kept in the back of a picture frame which usually hung on a wall but, at the time of his hospitalization, the picture was put in the desk drawer of the desk in the basement (Rec. 8, pp.

41-45).

The petitioner had a set of keys for the house and the burglar alarm system, as did the complainant. His son had keys to the house only (Rec. 18, p. 49).

On February 22, 1983, the petitioner and her husband, Don, came over to the complainant's house to go through some old coins he had decided to sell with the help of the Wattawas. He had some difficulty opening the large safe behind the pane, so he gave the combination to Mr. Wattawa who opened the safe (Rec. 18, pp. 61-69). After opening the safe, he took the coins out and Mr. Wattawa sat at the desk in the basement and wrote down the dates (Rec. 18, p. 75).

The complainant and the petitioner were in the shower room, and the complainant showed the petitioner the

money contained in the drawers and told the appellant to count it. On this date there was $40,000.00 in the middle drawer and there was an additional $10,000.00 in the bottom drawer (Rec. 18, PP. 75-83).

After the coins were inventoried, they put them back into the safe and then secured the drawers and the outer door. He placed the picture frame and combination to the desk drawer and told the petitioner to notify his relatives if for any reason he did not return home from the hospital. No one else was in the home that evening (Rec. 18, pp. 86-88). From February 22, 1983 to February 28, 1983, he had no other occasion to go into the safe (Rec. 18, p. 89).

After returning from the hospital, he went down to the safe to remove some coins to sell to a coin dealer (Rec. 18,

p. 92). On March 7, 1983, he went down to remove some more coins and he discovered that $40,000.00 was missing from the middle drawer. The $10,000.00 in the bottom drawer was still there. He went upstairs and confronted the petitioner who was there working. She denied taking the money (Rec. 18, pp. 94-95). Prior to discovering the money missing, the complainant offered to buy the petitioner a new car (used) because hers was sold. From March 7, 1983 to March 11, 1983, he went shopping with the Wattawas for this new (used) car. On March 11, 1983, Mr. Wattawa purchased a car at Stark Olds and paid for it in cash. On March 14, 1983, the petitioner asked the complainant to reimburse Mr. Wattawa for the purchase price as agreed (Doc. 18, pp. 97-100).

The complainant did not report the money missing to the police until March

21, 1983. The reason for waiting was he wanted his nephew, Dominic Frinzi, who was in Italy on business, to take care of it for him (Doc. 18, p. 100).

The complainant testified that his son, the petitioner and her husband, and himself, were the only persons who knew where the safe was. Further, only Marge and he knew the keys were kept in the small safe and the combination in the frame which was then kept in the desk drawer (Rec. 18, p. 104). The complainant did not inform his son of the theft because he was afraid his son would have another stroke (Rec. 18, P. 112).

On March 9, 1983, the complainant discovered another $250.00 missing from the small safe, and challenged the appellant who denied taking that $250.00 (Rec. 18, pp. 114-116).

From February 22, 1983 to March 21, 1983, there was no evidence of forced entry nor were there any malfunctions in the burglar alarm (Rec. 18, pp. 121-123).

From November of 1982 to March of 1983, the complainant purchased numerous items for the petitioner and her family. Some of the items are as follows: carpeting for living room ($500.00), two chairs ($600.00), a kitchen set ($1,100.00) (Rec. 18, pp. 138-139); $3,250.00 for a new (used) car (Rec. 18, p. 100), loan of $6,000.00 to Mr. Wattawa to set up business of buying and selling used cars (Rec. 18, p. 57), remodel bathroom (Doc. 18, p. 57), the petitioner was named in a specific bequest in his Will in the amount of $20,000.00 (Rec. 18, p. 140), promised to give loan to Wattawa's to remodel house -- estimate was approximatley $25,000.00 (Doc. 18, p. 40).

While in the hospital, the complainant had arranged with a nurse's aide, Carol Ragstrom, to stay with his son, Claude, at night (Rec. 18, p. 147).

Claude Di Beneditto (Hereinafter referred to as Claude) testified that he lived with his father. He knew the location of the safe and the combination (Rec. 19, pp. 65-66). On March 1, 1983, he went to Curative Hospital for rehabilitation treatment after suffering a stroke in 1981 (Rec. 19, p. 68). On this day he came home later than he usually did, which was approximatley 3:30 p.m. (Rec. 19, p. 69). The van driver assisted him into the house. The alarm system was off (Rec. 19, pp. 70-71). The petitioner had come over to make him supper per arrangements made by his father before he went into the hospital (Rec. 19, pp. 71-72).

After preparing supper, the petitioner went downstairs into the basement. Claude heard the metal cabinet being moved and the plywood panel removed. Then there was a period of silence (Rec. 19, pp 72-75). The next thing Claude saw was the petitioner coming up the stairs with a grocery bag. She walked into the living room and then left in his father's car (Rec. 19, pp. 76-77).

Claude was informed about the theft but not the amount of theft on Easter Sunday (Rec. 19, p. 81)

Carol Ragstrom testified she is a nurse's aide presently working as a housekeeper for the complainant (Rec. 19, p. 112). During the period while the complainant was in the hospital, she stayed over night with Claude. On March 1, 1983, she arrived at about 9:00. The only one home was Claude (Rec. 19, p.

115). (She later contradicts this in a cross-examination, p. 125) She stopped coming over on March 16, 1983 when Claude went into a nursing home. She was told of the theft about two weeks after her termination (Rec. 19, pp.116-117). When she left on March 2, 1983, the petitioner was already gone and she did not turn on the alarm (Rec. 19, pp. 116-120).

The petitioner testified that on March 14, 1983 the complainant went down into the basement to get the $3,250.00 to reimburse her for the monies paid Friday before-hand for a new and used car she had purchased. He returned with the money, however, he told her that $20,000.00 was missing. He was upset and said he could not imagine where it went. He asked if she took it, as a joke. She said no. He stated he was going o call the police but changed his mind (Rec. 20, pp. 69-71).

She further testified that when the complainant was in the hospital, she agreed to make sure that Claude's breakfast and lunch were prepared and that she was to make sure he was fed supper. The complainant's nephew, Gino Frinzi, was supposed to feed Claude dinner, prepared earlier by the petitioner (Rec. 20, pp. 72-73).

On March 1, 1983, the petitioner went to the house in the morning: prepared breakfast and lunch for Claude and left and went bowling as was her custom on Tuesday. After lunch, she stopped to see the complainant who was not in his room. She took one daughter to the doctor and returned home about 5:15 p.m. She then went over to check on Claude. Gino had not shown up and she fixed dinner and cleaned up the kitchen. After Gino arrived she left (Rec. 20, p. 72) She denied going into

the basement and she denied taking the money (Rec. 20, pp. 76-78)

The petitioner's daughter Kathy testified that her mother brought her sister home and then went to the Di Beneditto home in the petitioner's car. Kathy was supposed to be at a friend's house at 6:00 p.m. when the petitioner came home. The petitioner was not carrying anything nor was anything left in the car (Rec. 20, pp. 134-135).

The petitioner's son testified that on March 1, 1983, he had the complainant's car to tune it up while he was in school. During the time while the complainant was in the hospital, he brought the car to the Di Beneditto house. Gino Frinzi's car was in the driveway. Steve asked him to move it so he could put the car in the garage.

While in the house, Gino asked him to get the magazines he had taken into the basement for Jack before he went to the hospital. Steve observed that on the kitchen table was several stakcs of coins (Rec. 20, pp. 144-147).

REASONS FOR GRANTING THIS WRIT

The decision below should be reviewed because it acquiesces in the operation of a Wisconsin Statute relative to the sole defendant being charged as a party to a crime where it would permit the jury to speculate as to whom the defendant was suppose to have aided and abetted where no other person was charged and there was no testimony as to whom the sole defendent could have aided or abetted.

The instruction that created the problem in this case is 400 Parties to a Crime:

"Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime may be charged with and convicted of the commission of the crime although he did not directly commit.

As applicable in this case, a person is concerned in the commission of a crime if he:

(a) Directly commits the crime, or

(b) Intentionally aids and abets the commissison of it, or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. However, such a party is not concerned in the commission of a crime if he voluntarily changes his mind and no longer desires that the crime be committed and notifies the other parties concerned of his withdrawal within a reasonable time before the commission of the crime so as to allow the others to also withdraw."

The rationale was that the instruction included the concept of a principal along with the concept of an accessory. The petitioner objected indicating that if the theory of the State was correct -- that is Claude's story -- she could only be found guilty if she were found to be a principal and not a party to a crime. The trial court though agreeing with petitioner in theory let the instruction in without giving a reason: (Record, p. 215).

At the trial court level when the parties where in chambers discussing the instructions, the District Attorney asked the Judge for the party to a crime instruction because "this was to cover any possibility that this was a husband and wife operation." Right there was the evil of the charge. Although the husband, Donald Wattawa, was not charged as a defendant nor was there any

testimony or evidence whatsoever that he had anything at all to do with the crime, such a charge permitted the jury to speculate that he did have something to do with it and, if he did, Margaret Wattawa might have known about it or helped him do it.

It's impossible for the defendant to defend against such speculation on the part of the jury.

The issue on review is whether the standard party to a crime instruction, phrased disjunctively, violates the petitioner's right to a unanimous verdict guaranteed by the Wisconsin Constitution and due process clause of the Fourteenth Amendment to the United States Constitution.

Due process and Sections 5 and 7 of Article I, of the Wisconsin

Constitution, guarnatee the right to trial by jury. The decisions of the United States Supreme Court have long assumed that this includes the right to a unanimous verdict.

Linked to the unanimity requirement is the due process requirement of the Fourteenth Amendment that the prosecution prove each essential element of the offense beyond a reasonable doubt. In RE Winship 397 U.S. 358, 90 S. CT. 1068, 25 L. ED 2D 368 (1970). This requirement finds its justification principally as a means fo reducing the risk of a guilty verdict resting on factual error. Recognizing the unanimity requirement and the reasonable-doubt standard, it is clear that the jury must agree unanimously that the prosecution has proved each essential element of the offense beyond a reasonable doubt before a valid verdict of guilty can be returned.

The question presented is whether this unanimity principle is violated where the trial court instructs the jury, in the disjunctive, as to the various ways a person might be guilty as a party to a crime without requiring the jurors to agree on the spplicable theory or theories specifically here that she was the principal.

The Court by instructing the jury on all aspects created probability that the jury, not crediting Claude's story, but rather finding that at some other time or with some other people found her guilty as an accessory. Such a finding would not come from any reasonable view of the evidence, and as such a conviction based upon such a finding cannot stand. This requirement is supported by the case of the United States vs. Gibson 553 F 2d 453 (5th Cir. 1977) where the Court required the jury

to agree on a factual theory or concept underlying criminal liability. Therefore the Court erred in giving the party to a crime instruction.

Gibson was convicted of violating a federal criminal statute which prohibits receiving, concealing, storing, battering, selling or disposing of a stolen motor vehicle moving in interstate commerce. In response to the jury's request for clarification concerning the charge, the trial judge issued an instruction which specifically allowed the jury to convict the defendant even though the jurors might disagree on which of the six acts the defendant committed.

The Court of Appeals for the Fifth Circuit, reversed Gibson's conviction. The court framed the issue as: "Where a single criminal statute prohibits a

number of acts, and a finding by the jury that the defendant did any one of the prohited acts is sufficient to convict him (provided, of course, that all other elements of the offense are found), is the defendant's right to unanimous verdict infringed if a guilty verdict is returned when all members of the jury agree that the defendant performed one of the prohibited acts, but disagree as to which of the acts he performed?"

The court stated that the six different acts could be divided into two conceptually distinct groups. The court reasoned that acts within each group were not conceptually distinct and presented characterization problems, but that the two groups were sufficiently distinguishable that no juror could find any one act included in both

The key quote for Gibson is:

"The unanimity rule" requires the jurors to be in substantial agreement as to just what the defendant did as preliminary to determining whether the defendant is guilty of the crime charged."

The respondent has claimed that the rationale of Gibson's unanimous verdict has been watered down, if not eliminated, by Holland vs. State, 91 Wis 2d, 134, 280 N.W. 288.

In Holland, defendant and a companion entered an apartment and assaulted the two female occupants. During the course of the assaults, one woman sustained injuries which subsequently led to her death. The companion was convicted of second degree murder, and Holland was charged with first degree murder as a party to a crime and convicted of second degree murder as a party to a crime.

The Wisconsin party to a crime statute allows a defendant to be held liable for a crime under any one of three theories: (1) direct commission of the crime; (2) aiding and abetting; and (3) conspiracy. The questions that arose in Holland was whether the jury must unanimously agree upon the theory encompassing the defendant's participation. At trial, conflicting evidence was presented which could have supported a guilty verdict under any of the three theories. The jury received the standard Wisconsin party-to-a-crime instruction, which lists all three theories in the disjunctive (commits, or aids and abets, or conspires to commit the crime). The jury returned a general verdict of guiltyy. Holland appealed his conviction claiming that, under the rationale set forth in United States vs. Gibson, the jury instruction deprived him of his right to a unanimous

verdict. Holland's conviction was overturned by the Wisconsin Court of Appeals. The Wisconsin Supreme Court reversed the appellate court and reinstated the conviction.

It is apparent that the lower courts interpreted Gibson narrowly. The better view as voiced by Constitutional Law--Criminal Procedure-Jury Instructions and the Unanimous Jury Verdict 1978 Wis. L. Review 339 was:

"The court (Gibson) stressed reliance on the policy underlying the unanimous verdict requirement. The court's position was that the unanimity requirement helps effectuate the reasonable doubt standard by requiring the jurors to agree upon "just what the defendant did" before convicting him. In State vs. Nutley 24 Wis 527, 129 N.W. 2d 155 (1964), the Wisconsin Supreme Court outlined the acts of aiding and

abetting and conspiracy as they related to the party to a crime statute before carefully examining the conduct of each defendant to determine which act was committed. The detailed explanation in Nutley as to what conduct applied to which theory of participation would be absolutely unnecessary if, as Holland holds, the manner of participation is a 'non-essential issue'."

As is essential from an analysis of these cases, for a defendant to get a fair trial, the jury must know precisely what he's charged with and then, in a criminal matter, unanimously agree to whether he or she is guilty of that charge.

In this case, since there is only one defendant, the case must be returned for a new trial at which this difficulty could be rectified by a special verdict which would ask:

"Did defendant take $40,000.00 from safe of Mr. Di Benedittо as charged?" Answer: Yes____ No____"

That's it. The jury would have had a clear cut issue: either she committed the crime or she didn't. Guilty of acquittal.

However, dragging the party-to-a-crime statute and instruction into the case permitted an unknown and another unknown number of jurors to find her guilty of collaboration with some unknown person. An unknown person against whom there was not a shred of evidence.

The instruction and the statute it was based on now leaves this case open to the possibility especially accentuated by the jury's three day deliberations, that the jury was not unanimously convinced that the defendant was the sole participant in this crime

but perhaps she was helping her husband or the complainant's son, Claude, or the nurse's aide, Carol Ragstrom, or someone unknown. Under the theory of where there's smoke there's fire, "she must be guilty of something" the jury after lengthy diliberations came in which a unanimous verdict by no one knows what they were unanimous about.

Thus, the inconsistencies of testimony, that the defendant supposedly in the presence of the owner's son, who is on the first floor and can hear anything, goes down the stairs and makes a great racket moving a heavy wall aside to get at the safe and then comes upstairs and walks past the son with a big paper bag cannot be resolved unless the defendant gets a new trial on what the jury actually found.

The absolute prerequisite to the "400 Parties to a Crime" instruction is that there has to be just that: parties to a crime. You can't do it with one party or you confuse the jury.

In this case the only evidence linking the defendant with this crime was the testimony of the complainant's son, Claude, who testified that on March 1, 1983 he saw the defendant go down to the basement, heard the loud noise of the wall covering the safe being moved, then saw the defendant going past him with a big paper bag.

If the case rested there, if the sole question had been, did the defendant do as the chief witness said, outside of the many incongruities of Claude, not mentioning for weeks what he later testified to or why someone who had access to the safe would take $40,000.00 in broad daylight in front of

the owner's son, nevertheless if a jury had brought in a verdict of guilty on such testimony that would have been the end of the case.

But the culprit was Wisconsin's 939.05 with its counterpart the Number 400 Instruction. Now we'll never know in long deliberations of the jury whether, although she may not have done the crime directly, and may not have done it on March 1, 1983, perhaps she took it another time when no one was looking or aided and abetted someone else to take it at a time not testified to or by people not referred to.

Who could the defendant be a party with?

CONCLUSION

Statute 939.05 is no model. It allows a non-unanimous verdict. Some jurors can believe she is a principal, some that she was an aider and abetter and still others that she was a conspirator.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari be granted

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Submitted July 22, 1987*
August 6, 1987

BEFORE

The Hon. Frank H. Easterbrook, Circuit Judge
The Hon. Kenneth F. Ripple, Circuit Judge
The Hon. Daniel A. Manion, Circuit Judge

MARGARET WATTAWA Petitioner-Appellant	)	Appeal from the United States District Court
No. 87-1104 v.	)	for the Eastern District of
WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES-PROBATION, Respondent-Appellee	)	Wisconsin No. 85 C 1557 John W. Reynolds, Judge

* After preliminary examination of the briefs, the court notified the parties that

O R D E R

Petitioner-appellant appeals from the district court's order adopting the magistrate's recommendation to deny petitioner a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Specifically, petitioner asserts that the giving of Wisconsin's "party-to-a-crime" instruction deprived her of her constitutional right to a unanimous jury verdict and that, in any event, there was insufficient evidence

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it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

to support the submission of such an instruction to the jury. The thoughtfully reasoned report and recommendation of the magistrate to whom this case was referred pursuant to 28 U.S.C. § 636(b)(1)(B), together with Judge Reynolds' order adopting the recommendation, fully and correctly dispose of petitoner's arguments. Accordingly, we adopt the district court's order as our own option.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN
Plaintiff-Respondent,
v.
MARGARET WATTAWA,
Defendant-Petitioner.

Civil Action
No. 85-C-1557

DECISION AND ORDER

Petitioner, Margaret Wattawa, seeks a writ of habeas corpus claiming that she was deprived of her constitutional right to a unanimous jury verdict and a fair trial when she was convicted on November 11, 1983, of theft as a party-to-a-crime under Wisconsin law. This petition was referred to Magistrate Robert W. Bittner for recommendation. The issues have been briefed, the Magistrate has given his recommendation.

The court has carefully considered the case file, the Magistrate's recommendation that the petition be denied, and the petitioner's objections to that recommended disposition. The court will deny the petition and adopt the Magistrate's recommendation

The Magistrate's recommendation correctly follows the Seventh Circuit's opinion in Lampkin v. Gagnon, 710 F. 2d 374, 377 (7th Cir. 1983), wherein that court upheld Wisconsin's party-to-a-crime statute from a similar attack. A review of the record and the evidence introduced at trial also reveals that there is not merit to the petitioner's attack on the trial court's decision to give the party-to-a-crime instruction or the jury's finding of guilt. The court will therefore adopt the Magistrate's recommendation, and his opinion, as the opinion of this court. A copy of the Magistrate's recommendation is attached.

IT IS THEREFORE ORDERED THAT Margaret Wattawa's petition for a writ of habeas corpus is denied and that Magistrate Robert L. Bittner's recommendation of June 4, 1986, is adopted as the opinion of this court.

Dated at Milwaukee, Wisconsin, this 1st day of December, 1986.

BY THE COURT:

John W. Reynolds,
Senior Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MARGARET WATTAWA
Defendant-Petitioner.

Case No.
85-C-1557
MAGISTRATE'S
RECOMMENDATION TO
THE HONORABLE
JOHN W. REYNOLDS

By her petitioner for issuance of a writ of habeas corpus, the petitioner complains that the giving of Wisconsin Jury Instruction 400 (hereinafter referred to as WJI 400) at her Wisconsin criminal jury trial deprived her of her constitutional rights to a unanimous jury verdict and to a fair trial. The petition, referred to this Court by the Honorable Chief Judge John W. Reynolds for recommendation, has been fully briefed by counsel for both parties and is ready for decision.

The petitioner was tried and convicted in Milwaukee County Circuit Court on November 11, 1983 of theft as a party-to-a-crime in violation of Wis. Stat. §§ 943.20(1)(a) and (3)(c) and 939.05. She was sentenced to seven (7) years imprisonment. Such sentence was stayed and she was placed on five (5) years probation with the condition she serve the first year at the House of Correction and pay restitution of $40,000. The petitioner has exhausted all available state remedies of the claims she raises by her petition.

By Ground One of her petition, the petitioner contends she was denied a unanimous jury verdict by the trial court's instruction (WJI 400) - theft as party-to-a-crime. The petitioner argues the instruction allowed for some jurors to conclude she was a principal and others to conclude she was a party-to-a-crime, without a unanimous

verdict on her actual participation. By Ground Two, the petitioner claims there was insufficient evidence to support the submission of WJI 400; and thus, the jury could only speculate on the charge given to them. Therefore, she was denied a fair trial.

WJI 400, in pertient part, reads:

> Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime may be charged with and convicted of the crime, although he did not directly commit it.

As applicable in this case, a person is concerned in the commission of a crime if he:

(a) Directly commits the crime, or
(b) Intentionally aids and abets the commission of it, or
(c) Is a party to a conspiracy with

> another to commit it or advises, hires, counsels or otherwise procures a another to commit it ....

The federal courts have no power to grant habeas corpus relief to a state prisoner in custody by violation of state laws. The Court must look instead to whether the state law errors deprived the petitioner of fundamental federal constitutional rights. The Sixth Amendment guarantees requiring a unanimous verdict in a federal jury trial, made applicable to the states by the Fourteenth Amendment (Duncan v. Louisiana, 391 U.S. 145, reh'g denied, 392 U.S. 947 (1968)), does not require that the jury's vote in a state criminal proceeding be unanimous. Apodoca v. Oregon, 406 U.S. 404, 410-12 (1972). Thus, Ground One of the petition does not raise a federal constitutional claim and cannot be the basis for issuance of

a federal writ of habeas corpus; nor can the contention that the instruction given by the trial court violated the Wisconsin Constitution because the violation of state law is not cognizable in a federal petition for a writ of habeas corpus. Engle v. Isaac, 456 U.S. 107, 119 (1982).

Even if the petitioner's Ground One contention was cognizable, this Court is not persuaded by her further argument that Holland v. State, 91 Wis. 2d 134, 144 (1979), cert. denied, 455 U.S. 931 (1980) (holding that unanimity of a jury is required only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged and is not required with respect to the alternative means or ways in which a crime can be committed) should not be followed because it is inconsistent with

with United States v. Gipson, 553 F 2d 453, 458-59 (5th Cir. 1977) (holding a federal criminal defendant's constitutional right to unanimous jury verdict was violated by trial court's instruction that he could be convicted, if he did any of six [6] acts listed in the statute prohibiting the sale or receipt of stolen vehicles). Any conflict which existed between Holland and Gipson appears to have been resolved by Lampkins v. Gagnon, 710 F.2d 374, 377-78 (7th Cir. 1983), cert. denied, 464 U.S. 1050 (1984), which expicitly stated:

> Wisconsin's party-to-a-crime statute is similar to 18 U.S.C. § 2(a) (1976) which provides that " [w]hoever committs an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission is punishable as a principal." We find no case law which indicates that a jury

> must unanimously agree whether a defendant aided, abetted, counseled, commanded, induced, or procured.

There remains for resolution only Ground Two of the petition which raises the contention that insufficient evidence exists in the record to support giving the party-to-a-crime instruction; thus, the jury was allowed to speculate and the petitioner was not afforded a fair trial. It is difficult to understand this contention of the petitioner, in light of the fact she does not argue that the evidence is insufficient to support the jury's verdict that she is guilty of directly committing the theft. This argument does not assist the petitioner when ample evidence exists to find her guilty as the sole actor. In

Application of Gipson's Unanimous Verdict Rationale to the Wisconsin Party to a Crime Statute, 1980 Wis. L. Rev. 597, 612 (1980). which the petitioner asks the Court to consider, the author proposed a "solution" in the form of a unanimity instruction which would accomodate Holland v. State and Gipson. However, the author concludes, in those cases where the defendant's acts are undisputed and no possibility of internal dispute exists within the jury concerning the method of participation, a unanimity instruction upon the method of participation is unnecessary. This is one of those cases; the evidence, as argued by the petitioner, points only to her direct commission of the crime.

In a habeas corpus proceeding involving a claim that there was insufficient

evidence for a petitioner's state court conviction, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324, reh'g denied, 444 U.S. 890 (1979). Here, in absence of a challenge to the sufficiency of the evidence by either party, this Court concludes the evidence in this case discloses that a rational trier of fact could find the essential elements of crime exist leading to the petitioner's guilt beyond a reasonable doubt. This conclusion is in accord with that of the Wisconsin courts; that is, under the strong circumstantial evidence existing in this case, a

rational trier of fact could find beyond a reasonable doubt that the defendant was guilty of the theft. In light of this conclusion, the giving of the party-to-a-crime instruction would only constitute harmless error.

Accordingly, it will be recommended that the instant petition for a writ of habeas corpus be denied.

CONCLUSION

NOW THEREFORE, IT IS HEREBY RECOMMENDED that the United States District Judge enter an order **DENYING** the petitioner's petition for a writ of habeas corpus.

Pursuant to 28 U.S.C. § 636 (b)(1)(B) and (C) and Local Rule 13.03 (E.D. Wis.). the parties shall have ten

(10) days from the date hereof to file duplicate written objections to the foregoing recommendation with the Clerk of Court.

Dated at Milwaukee, Wisconsin this 2nd day of December, 1987.

Robert L. Bittner
United States Magistrate